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NO. 80-2080

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1980

RON TONKIN GRAN TURISMO, INC.,

Petitioner,

v.

FIAT DISTRIBUTORS, INC., and
WAKEHOUSE MOTORS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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May 28, 1981

QUESTION PRESENTED

A prospective dealer, which has concluded an agreement with a manufacturer (subject only to formal approval at the home office), moves into a new location and signs a long term lease with the blessing and strong encouragement of the manufacturer. Just before 54 automobiles, which had been earmarked for the dealer, are to be shipped, the manufacturer yields to demands of an already existing nonexclusive dealer by granting the latter veto power over all potential competition in a major metropolitan center. That veto is then used to exclude the new dealer.

Should the dealer be allowed to present his proof to the fact-finder on the theory that such conduct is: a violation of the rule of reason as a restraint of trade; and/or a concerted refusal to deal and boycott, and thus a <u>per se</u>

violation of the Sherman Act?

Was the successful insistence by the manufacturer that the prospective dealer first surrender two lines of products which compete with its own, before it would ship its products, another form of restraint of trade?

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A manufacturer decides that it and the public are in urgent need of a second dealer in a large metropolitan area because the prices charged by its only existing dealer are too high, the sales volume too low and the suburban location too remote. Its only dealer was not appointed on an exclusive basis and long knew that the manufacturer intended to appoint additional dealers. The manufacturer contacts another dealer in the area that has an outstanding reputation and sales ability, and successfully urges such dealer to acquire a second store under a long-term lease and move its entire staff and equipment to the new location. The manufacturer also successfully demands that the dealer

surrender two other lines of products which are competitive with those of the manufacturer. The new dealer gives the manufacturer its check for $32,493. and 54 specific cars are set aside for immediate shipment. The new dealer is assured that his appointment is a certainty and his application is approved by both zone and regional offices. While awaiting formal approval at the national headquarters of the manufacturer, the existing dealer arrives without an appointment and pressures the manufacturer into withholding the 54 cars and also extracts a "veto" power over the appointment of any new dealers for an indefinite period. The old dealer then exercises his "veto" to block the appointment and the shipment of vehicles already earmarked for the new dealer.

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A. INTRODUCTORY STATEMENT . . . 10

The petitioner should have been given an opportunity to present its proof that this conduct is:

a violation of the rule of reason as a restraint of trade; and/or

a concerted refusal to deal and boycott, and thus a per se violation of the Sherman Act.

It was error to grant summary judgment.

B. The Court of Appeals' decision which approved the entry of summary judgment under such circumstances sharply conflicts with the decisions of at least three other courts of appeals. 11

C. The decision of the Court of Appeals conflicts with this Court's decisions in a number of other respects 18

CONCLUSION 22

This decision below strikes a crippling blow at the indispensable first step under a free enterprise system and concerns an issue of vital national importance which should be decided by this Court. 22

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NO. _____

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OCTOBER TERM, 1980

RON TONKIN GRAN TURISMO, INC.,

Petitioner,

v.

FIAT DISTRIBUTORS, INC., and
WAKEHOUSE MOTORS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit filed March 2, 1981.

OPINIONS BELOW

A copy of the opinion of the District Court for the District of Oregon of December 4, 1978, granting summary judgment to respondents, is attached as Appendix B, infra, A-53; the earlier opinion by the Magistrate George Juba is attached as Appendix C, infra, A-54.

The opinion of the Court of Appeals for the Ninth Circuit of March 2, 1981, affirming the judgment of the district court is reported at 637 F.2d 1376. A copy is attached as Appendix A, infra, A-1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1). The jurisdiction of the Court of Appeals was based upon 28 USC §1291, and that of district court was based on 28 USC §§ 1331(a) and 1337, and 15 USC §1.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 USC §1, 26 Stat 209:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

Proceedings Below:

Petitioner (a Portland, Oregon, foreign car dealer) charges that respondents (Fiat and Wakehouse [its only Portland dealer]) collectively restrained trade and engaged in a boycott by totally suppressing all potential competition for the sale of Fiat automobiles, parts, service, and warranty work, in two of Oregon's most populous counties.

Respondents' motions for summary judgment under Rule 56 FRCP were sustained by the district court which felt that

the facts described below did not constitute a cause of action.

Petitioner appealed to the Court of Appeals for the Ninth Circuit under 28 USC §1291. On March 2, 1981, the court affirmed the district court.

Facts:

Portland, Oregon, is the only major American city that has only one Fiat dealer and no downtown Fiat dealer.

For 14 years, Fiat solicited petitioner and tried to persuade him to become its second Portland Fiat dealer. Petitioner, the second Ferrari dealer on the West Coast, and the first Honda automobile dealer in the U.S., has a long, successful history as a car dealer.

In 1972 Fiat and petitioner agreed that petitioner would become Fiat's second Portland dealer. Just before the agreement was to be finalized at Fiat's highest level, petitioner lost his lease,

and the parties were unable to complete the deal.

In October 1974 Fiat again solicited petitioner to become its second Portland dealer. Fiat's other Portland dealer, respondent Wakehouse, was not an exclusive dealer and was long aware that Fiat planned to appoint a competitor. Fiat had decided that Wakehouse's prices were too high, its sales volume too low, and its suburban locations too remote. Petitioner had for many years been one of Portland's highest volume car dealers, and with Fiat's active encouragement found a convenient downtown location with a long-term lease.

The negotiations between Fiat and petitioner became serious. Petitioner completed its lengthy dealership application; and with Fiat's knowledge and approval it signed the long-term lease, moved its entire staff and equipment to

the downtown location, secured a $150,000 line of credit, and gave Fiat a $32,493 check. Meanwhile, petitioner selected for sale and Fiat specially earmarked for immediate shipment 54 new Fiats to be sold by petitioner. After petitioner's commitments were finalized, Fiat unilaterally determined that an additional condition precedent would govern whether petitioner could then sell Fiats--petitioner had to relinquish its two best selling lines, Honda and Saab. Petitioner did so after being told by respondent Fiat that if he did, it was certain the franchise would be his.

Petitioner was then left with only two very slow moving lines of automobiles: Alfa Romeo and Ferrari. Meanwhile, it was committed to its new and now too-large location, had given up its best selling lines, and had more salesmen and staff to pay than cars to sell.

After Fiat's Zone and Regional managers had approved the deal, and without the knowledge of petitioner, Wakehouse flew uninvited to Fiat's home office and initiated discussions in which he expressed strong disagreement with Fiat's decision to appoint petitioner as his competitor, and requested that Fiat withhold delivery of the 54 cars to petitioner.[1]

Fiat finally capitulated to Wakehouse, but simultaneously represented to petitioner that there would be only a temporary "hold" on his dealership being approved at the highest level. Fiat later agreed to give Wakehouse a new "veto" power which would permit him to block any future appointment by Fiat of

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1. Wakehouse at first testified that he was unaware of Tonkin's impending appointment until he reached Fiat's New Jersey headquarters. However, later he conceded this was a lie and that he knew of the appointment before he left Oregon.

new dealers in the Portland area. Wakehouse immediately used his "veto" power to permanently block petitioner's appointment, and Fiat went along with Wakehouse's choice.

To reinforce its position, Wakehouse then joined with all other Northwest area Fiat dealers and demanded that Fiat refrain from appointing any new dealers in that entire region until it was first determined to their satisfaction the market demand was not adequately met.

Petitioner later was appointed by Fiat to sell Lancias, Fiat's second line of automobiles. Wakehouse then exercised his "veto" power to block shipment of the Lancias to petitioner. Fiat agreed, and subsequently appointed Wakehouse as an exclusive Lancia dealer for the Portland area.

Almost never in Fiat's history has a dealer been approved by Zone and Regional

Managers and disapproved by Fiat headquarters.

Absent Fiat's agreement with and cooperation in Wakehouse's attempt to prevent plaintiff from becoming a Fiat dealer, petitioner would today be in healthy competition with Wakehouse.

REASONS FOR ALLOWING THE WRIT

A. Introductory statement.

The Ninth Circuit's holding strips the antitrust laws of all meaningful force.

If these facts do not constitute both a restraint of trade and a collective boycott, then the terms are little more than vacuous phrases. It also gives a green light to dealers, distributors, or jobbers--regardless of size--to demand successfully--with impunity--that no competitors be appointed in their territory, and that those who are appointed be erased.

B. The Court of Appeals decision conflicts with the decisions of other Courts of Appeal.

The Ninth Circuit's sanction of Wakehouse's veto power has been strongly condemned as a restraint of trade by the Eighth, Third, and First Circuits, as well as by numerous district courts.[2] This case has therefore created a conflict between the circuits.

Moreover, collective boycotts have repeatedly been condemned as per se violations of the Sherman Act by this court.

As stated by Professor Lawrence Sullivan of the University of California:

"[W]hen an existing dealer enlists the manufacturer to choke off one of the dealer's competitors, although the 'agreement' which enables Section 1 to be invoked is vertical, the restraint thereby achieved is horizontal in its impact; it is an attack by one dealer against another."

L. Sullivan, Handbook of the Law of Antitrust at 429 (1977)

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2. See discussion infra, pp 12 et seq.

In the vast majority of decisions, the surrender by a manufacturer to its customers of the right to select their competition has been held to be a restraint of trade. Virtually the only approved exception is where the industry is a dying industry, and there was no other course open to save the customer's business.

Fiat sales--unlike those of some domestic models--are not moribund. On the contrary, Fiat long recognized the need for an additional dealer in the Portland area. Wakehouse, which admitted that it sought and obtained Fiat's cooperation in this endeavor, wanted to ensure a permanent enclave. Indeed, as Wakehouse put it, he wanted no competitors because he knew "he had a good thing going."

Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir 1976), cert. den. 433 U.S. 914, (1976) held that where Ford gave a Minneapolis Lincoln dealer

the discretion to determine whether any new Lincoln dealerships should be permitted in the city, the agreement between Ford and the first dealer was a restraint of trade in contravention of §1 of the Sherman Act. Circuit Judge Lay observed :

> "Quality's complaint alleges that there was no valid business reason for the denial of a new Lincoln dealership in the Minneapolis area. We find this absence, when combined with the allegation that Prestige, a horizontal competitor, could in its sole discretion determine if the Minneapolis market was to be serviced by another Lincoln dealership, renders reasonable the inference of an anticompetitive motive or effect.
>
> "The unreasonable character of agreements allowing horizontal competitors to exercise in effect a veto power over a new franchise application was considered in United States v. Topco Assoc., Inc., 405 U.S. 596, 608 (1972), and American Motor Inns, Inc. v. Holiday Inns, Inc. 521 F. 2d 1230 (3d Cir. 1975). In the latter case, AMI's application for a Holiday Inn franchise at the Newark Airport was rejected. In considering the application, Holiday mailed written notices of the application to the three Holiday Inn franchises nearest the airport site. These 'radius letters' were standard procedure in reviewing applications. The trial court found that a negative response by an existing franchisee was treated as a

veto over the application. On appeal Judge Adams said:

> 'By thus permitting its existing franchisees to determine whether a potential competitor would be allowed to enter the Elizabeth-Newark market, HI enabled its franchisees already in the Elizabeth-Newark area to divide that market between themselves, thus precluding further intrabrand competition. Such conduct constitutes a horizontal market allocation that is a violation of the Sherman Act.'
>
> * * *
>
> ". . . The purpose of the Sherman Act is the elimination of restrictions on competition."

Quality Mercury, 542 F.2d at 470-72.

In American Motor Inns, Inc. v. Holiday Inns, Inc., supra, Judge Adams said:

> "HI's action in denying AMI's application, according to the trial court, was not taken unilaterally, but rather in concert with one or more of its licensees. If HI had acted independently in refusing AMI's request, such conduct might have been akin to the vertical restraints in Schwinn. But where, as here, the action in question is ascertained by the finder of fact to be joint or collaborative, it is sufficient to constitute a 'combination or conspiracy' within the meaning of the Sherman Act."

American Motor Inns, 521 F.2d at 1243.

In U.S. v. Topco Assoc., 405 U.S. 596 (1972), a number of grocery chains formed Topco and manufactured a line of private-label grocery products that member chains could then retail. Each participating grocer was assigned a territory in which it had the exclusive right to market 'Topco' label products. When non-member grocers applied for permission to market 'Topco' products, existing members with operations closest to the applicant, or any other member within 100 miles of the applicant's stores, had a right to object to the applicant's licensing for Topco Products. In discussing 'Topco' the Third Circuit said:

> "The power of existing members to lodge such an objection, the Supreme Court said, operated as 'a veto of sorts' over the approval of the application. The Court held that these features of the Topco plan constituted a horizontal restraint of trade and therefore a per se violation of section 1 of the Sherman Act."

American Motor Inns, 521 F.2d at 1242.

In Cernuto, Inc. v. United Cabinet

Corp., 595 F.2d 164 (3d Cir. 1979), Cernuto, a discount retailer of kitchen cabinets, acquired its cabinets from manufacturer United Cabinet. United subsequently ceased to supply cabinets, three months after agreeing to do so. Cernuto sued United charging that a complaint to United by one of Cernuto's competitors had motivated United to terminate its supply agreement. Summary judgment for the defendants was reversed on appeal by the Third Circuit, which observed:

> "When a marketing decision, although ostensibly taken by a manuufacturer, is in fact the result of pressure from another customer, such a decision must be scrutinized more closely than solely unilateral action might be. This Court recently observed in a different context:
>
> > 'Particularly where the refusal to deal is not unilateral but rather is prompted by an understanding with

> other parties, an antitrust violation may be found, either by application of a per se rule or through a "rule of reason" analysis.'
>
> . . .
>
> 'When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by imposing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the GTE Sulvania decision. However, if the action of a manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level.'"

Cernuto, 595 F.2d at 167.

This same distinction was recognized in Mannington Mills v. Congoleum Industries, Inc., 610 F.2d 1059, 1070 (3rd Cir. 1979).

If Fiat had acted alone when it decided not to ship the 54 vehicles, the situation would be different. In this case, however, Fiat had long recognized the

economic need of having a second Portland dealer and would have formalized the agreement and shipped the vehicles but for its succumbing to the pressure exerted by Wakehouse. Under these circumstances, the resulting restraint is primarily horizontal. As stated in U.S. v. Griffith, 334 U.S. 100, 107 (1948):

> "It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. U.S., 332 U.S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. U.S. v. Aluminum Co. of America, supra."

C. The decision of the Court of Appeals conflicts with this Court's decisions.

In a variety of contexts this Court and others have struck down collaborative actions which prevented competitors from entering a given market. U.S. v General Motors, 384 U.S. 127, 145 (1966); Poller v. Columbia Broadcasting System, Inc., 368 US 464 (1962); Radiant Burners,

Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); U.S. v. Griffith, 334 U.S. 100, 107 (1948); International Salt Co. v. U.S., 332 U.S. 392, 396 (1947); Associated Press v. U.S., 326 U.S. 1 (1945); Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317, 1320 (9th Cir. 1975), cert den 423 U.S, 1053 (1976) Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966).

In Westman Commission Co. v. Hobart, 461 F.Supp 627 (D. Colo. 1978), a manufacturer was induced by one of its dealers not to appoint the plaintiff as a second dealer in the Denver area. In holding that this stated a cause of action under the Sherman Act, Judge Kane said:

> "This is not a case, as suggested by defendant, of a manufacturer merely choosing not to deal with a particular distributor or trader. Rather it is a case of a combination of a manufacturer and a competitor which is possessed of the pernicious purpose to exclude a competitor from the market by cutting

off its source of supply."[3]

Westman, 461 F.Supp. at 636.

The collaborative action of Wakehouse and Fiat is also a clear collective boycott, having serious horizontal effects. As such it is illegal per se, whether horizontal,[4] vertical,[5] or mixed. It is not necessary that the boycott be entered by a large group. Here the agreement of two persons or entities was sufficient to stifle all competition. Two or more will suffice, as the precedents

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3. In accord: Copperstone v. Griswold Sporting Goods Co. (E.D. Mich 1977), 1977-2 Trade Cases ¶61,623

4. E.g., U.S. v. General Motors Corp., 384 US 127 (1966); Silver v. New York Stock Exchange, 373 U.S. 341 (1963); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Northern Pac R Co. v. U.S., 356 U.S. 1 (1958).

5. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959); see also Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961).

make clear.[6] The inference to the contrary in the Ninth Circuit's decision advances form over substance and has permitted economic results that contravene the wording and intent of the statute.

The recent case of Corey v. Look, 641 F.2d 32 (1st Cir. 1981) makes this clear. In Corey, the court held that a steamship authority (which operated a parking lot) having enlisted the aid of a city in blocking the plaintiff from securing a rival parking lot in the same city, was guilty of a "concerted refusal to deal under the antitrust laws."[7]

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6. Sullivan, Antitrust §91, 260; 11 Von Kalinowski, Antitrust Laws & Trade Regulation §76.01.

7. See also Barry v. St. Paul Fire & Marine Insurance Co., 555 F.2d 3 (1st Cir 1977), aff'd sub nom St. Paul Fire & Marine Ins Co. v. Barry, 438 US 531 (1978).

CONCLUSION

This case presents a question of national importance which should be resolved by this Court.

The Ninth Circuit's decision gives businessmen a free hand to suppress and/or eliminate their competitors. It seriously weakens the Sherman Act in an area of vital importance to the economy in general. If competition is worth preserving--and Congress through the Sherman Act, we submit, has already made that choice--then the law must be applied to preclude a non-exclusive dealer from pressuring a manufacturer into agreeing that potential competition should be throttled.

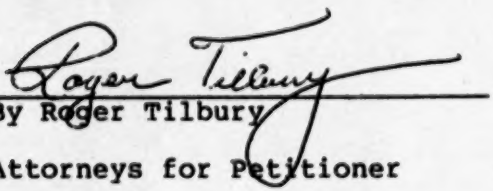
There is a sharp conflict in the circuits, as shown above. Moreover, the Ninth Circuit's decision is at cross purposes with decisions of this Court, and contravenes holdings by other courts that

an illegal boycott having horizontal effects may arise from a vertical relationship between two conspiring participants.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRICKER, ZAKOVICS & QUERIN
HAESSLER, STAMER & TILBURY



By Roger Tilbury

Attorneys for Petitioner

APPENDIX

Opinion of the Court of Appeals
Decided March 2, 1981

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RON TONKIN GRAN TURISMO, INC., Plaintiff-Appellant,	)	
v.	)	No.
FIAT DISTRIBUTORS, INC. and WAKEHOUSE MOTORS, INC., Defendants-Appellees.	)	79-4003

Before: VAN DUSEN*, KILKENNEY and HUG, Circuit Judges

KILKENNY, Circuit Judge:

Appellant, on November 26, 1975, brought this antitrust action against Fiat Distributors, Inc. (FDI) and Wakehouse Motors, Inc. (Wakehouse) alleging violations of Sherman Act §§ 1 and 2 and Clayton Act §3. Appellant is a dealer in foreign cars in Portland. FDI is the United States distributor of Fiat automobiles and Wakehouse is the only Fiat dealer in the Portland area.[1] This action was instituted after appellant's

* The Honorable Francis L. Van Dusen, Senior United States Circuit Judge for the Third Circuit, sitting by designation.

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1. Since 1972 Fiat has had multiple dealers in nearly all metropolitan areas. In 1972 Fiat established outlets in Vancouver, Washington and Gladstone, Oregon. These dealers are, by appellant's estimation, 8.6 and 12.2 miles from Portland's core area.

unsuccessful attempt to become the second Fiat dealer in the Portland area.

The case was referred to a magistrate who found that appellant's complaint included the following claims:
(1) monopoly; (2) attempt to monopolize; (3) conspiracy to monopolize; (4) tying arrangements; (5) group refusal to deal; and (6) price fixing. Both appellees moved for summary judgment on all issues. On January 25, 1978, the magistrate, in his findings and recommendations, concluded that both appellees were entitled to summary judgment on all issues. Appellant filed objections to the magistrate's findings and recommendations and the district court judge, after a de novo review, entered an order on December 4, 1978, which affirmed the magistrate's findings and recommendations and dismissed the action. This appeal followed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This controversy centers upon the rejection of appellant's application for a Fiat dealership. After a period of preliminary discussion and preparation,[2] a Fiat franchise application was signed on October 18, 1974. Appellant ordered cars and parts and gave Fiat a check for $32,493.95. The application clearly states that no binding agreement was created. The application, in order to be final, required home office approval.

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2. Appellant contends that during the application process it was induced by FDI "(1) to move its entire operation to a new location where it took a long-term lease at $2500 per month (including taxes), (2) to spend a great deal of money in renovating the new plant, and (3) to surrender the two fastest moving lines of vehicles (Honda and Saab), neither of which could thereafter be recaptured, relying upon Fiat's express assurance that if it did all these things, the Fiats would be delivered." Appellant's Reply Brief at 4.

Appellant's check was returned on November 25, 1974. The application was not approved.

Appellant contends that the dealership arrangement would have been consummated but for the intervention of Wakehouse.[3] After learning of appellant's impending appointment, a representative

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3. Appellant also contends that the alleged agreement to exclude it from the market extended beyond the simple vertical arrangement between FDI and Wakehouse. The agreement to block the appointment of additional dealers allegedly included members of the Northwest Fiat Dealers Association. On May 21, 1975, members of the association sent a mailgram to FDI which expressed grave concern as to the appointment of additional dealers and requested an indication of FDI's intent with respect to areas in which sales were lagging (Portland was one of these areas). This mailgram, which seems to be the only shred of evidence of involvement of any other dealers, allegedly supports the claim that there existed a wide horizontal conspiracy to bring about a horizontal division of the market or at least the elimination of appellant as a prospective competitor.

of Wakehouse made a trip to Fiat's national headquarters on October 21, 1974. Appellant characterizes this visit as an attempt on the part of Wakehouse to protect its position as the sole Fiat dealer in the Portland area, and asserts that Wakehouse prevailed upon Fiat to reject the application for a new dealer. These facts allegedly support the existence of an agreement between FDI and Wakehouse to exclude a competitor of Wakehouse, and appellant maintains that this arrangement constitutes a per se violation of the antitrust laws.

Appellant maintains that the result of Wakehouse's exercise of "veto" power over the appointment of a new dealer has not been good "for Fiat, for customers, for competition in general, and certainly not for Ron Tonkin Gran Turismo." The negative impact on competition is premised upon appellant's assertion that Wake-

house has a monopoly in the relevant product and geographic market. The relevant market is defined as Fiat cars, parts, service and warranty work in the Portland area. Appellant's definition of the relevant market is based on its unsubstantiated belief that for a sizeable number of customers only a Fiat will do. Because Fiats, in appellant's opinion, constitute a separate market, Wakehouse's position as the sole dealer in the Portland area allows it an unrestrained power to exact exorbitant profits in its sales of Fiat cars, parts, service and warranty work. Appellant continually claims that, as a result of this alleged monopoly position, Wakehouse's profit margins have been excessively high

FDI contends that this litigation "is a bold attempt by an auto dealer to muscle his way into Fiat's dealer organization through abusive and meritless

l igation." The evidence, in FDI's view, indicates that FDI, at the request of a local dealer with unsatisfactory sales, refrained from deciding whether to appoint an additional dealer while the existing dealer attempted to increase sales. FDI explains that it gave Wakehouse two 90-day probationary periods, ending in June, 1975, in which to increase sales. The possibility of an additional dealer was used to stimulate Wakehouse to improve its sales efforts. Wakehouse reached the targets FDI had set and the question of appointing appellant was dropped. FDI contends that this conduct by a small distributor at the behest of a single dealer in a market dominated by competitive brands does not violate Section 1, and that it was entitled to summary judgment.

It is clear that FDI has a different conception of the relevant market. FDI

maintains that the market is much broader than simply Fiat cars. FDI asserts that there are many competing types of automobiles. In fact, appellant acknowledges this on many occasions. FDI asserts that foreign cars constitute the principal competition. Fiat's share of the foreign car market in Portland was between 2.48%-3.51% from 1972-1974 and it rose to 5.2% in 1975. Its percentage of total car registration varied from .61%-1.87%.

In the court of the Fiat dealership application process, Fiat allegedly insisted that appellant divest itself of two competing lines of automobiles (Honda and Saab) before the franchise would be granted. Appellant maintains that it "did so relying upon Fiat's assurance that the franchise would follow as a matter of course, but thereafter, Fiat acceded to the importuning of Wakehouse,

and declined to ship the cars and to formally issue the Fiat franchise as it had promised. This . . . is a violation of Section 1 of the Sherman Act and Section 3 of the Clayton Act because it is a tying arrangement and therefore a per se violation, and/or an offer of an exclusive dealing arrangement on the condition that Tonkin not use or deal in the goods and merchandise of a competitor of Fiat, and therefore, violates the rule of reason. In either event (either as a tying arrangement or an exclusive dealing arrangement) the Sherman and Clayton Acts have been transgressed." Appellant's brief at 5-6.

FDI's response to this argument is simply stated: "The baselessness of this litigation is illustrated by GT's charge that Fiat imposed upon it an unlawful 'tying' or exclusive dealing arrangement, based on a statement of a Fiat represent-

ative that he did not want Hondas and Saabs to be sold from the same location as Fiats." Aside from the legal obstacles to appellant's assertion of a colorable claim of an illegal tying or exclusive dealing arrangement FDI notes several factual problems: (1) appellant could never secure permission from Honda or Saab to sell their cars from Tonkin's SW Morrison Street store (the location of the prospective Fiat dealership); (2) appellant did not "surrender" Honda, but transferred it to his Chevrolet agency; and (3) the Saab franchise was terminated because the distributor was understandably upset over appellant's miserable sales performance.

The magistrate's findings and recommendations, later adopted by the district judge after a de novo review, show that appellant had raised many factual issues, but concluded that they were immaterial,

i.e, they could not prevent the appellees from prevailing at trial. Summary judgment was granted with respect to the Sherman Act §2 counts and the propriety of this ruling has not been questioned on appeal. Some of the magistrate's observations with respect to those counts are, however, relevant to the issues at hand. The magistrate concluded that

> "The relevant-product market is not Fiats; it is cars in general. The automobile market has always shown high cross-elasticity of demand. There is nothing so special about a Fiat that a prospective purshaser will refuse to buy a Datsun or Chevette, no matter what the price of a Fiat. Other courts have considered and rejected allegations similar to Tonkin's with respect to Cadillac, Mogul v. General Motors Corp., 391 F.Supp. 1305 (E.D. Pa. 1975) aff'd., 527 F.2d 645 (3d Cir. 1976), and Dodge, Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F.Supp. 453, 461 (W.D. Pa. 1968), aff'd., 417 F.2d 622 (3d Cir. 1969). Plaintiff should not be allowed to go to trial on its unsupported allegation that, for 'a sizeable number of customers . . . [o]nly a Fiat, or a Lancia, will do.'"

The magistrate also rejected the Section 2 claims with respect to the "sub-markets", e.g., parts, largely because of the conclusion that it would be inappropriate to fragment the case. Concluding that it was the rejection of the application for the car dealership that was fundamentally at issue, the magistrate refused to give extended consideration to the so-called "sub-markets." The parts claim, and presumably service and warranty work as well, was considered to be so intertwined with the sale of Fiat cars that the court treated them as a unit.

The magistrate also granted summary judgment with respect to appellant's tying arrangement allegation. The magistrate cited a number of factors which led him to conclude that appellant's allegation that FDI demanded that it divest itself of its Honda and Saab dealership

did not remotely suggest the existence of a tying arrangement. Most simply, the magistrate concluded that "Plaintiff simply fails to show the existence of two separate products."

Furthermore, the magistrate granted summary judgment with respect to appellant's refusal to deal or group boycott claim. After drawing all inferences in favor of appellant, the magistrate concluded that FDI and Wakehouse had an agreement to maintain an exclusive distributorship arrangement in the Portland market. He found

> "The exclusive Wakehouse dealership excludes other Portland dealers, including plaintiff, only from the Fiat market, not from the automobile market. They may freely deal in many brands which compete with Fiat and are substantially equivalent. Plaintiff's case citations concern only situations in which large numbers of dealers and distributors agreed to exclude selected dealers or in which a plaintiff was entirely excluded from a relevant market . . .The arrangement between Fiat and Wakehouse is a proper exclusive dealership

> under the antitrust laws. Wakehouse has no power over Fiat's licensing of other distributors other than ordinary business leverage. Fiat will change to another dealer or dealers when its economic interests, as it perceives them, so require."

Before proceeding to a discussion of the legal issues which are raised on appeal, it is important to emphasize one issue that is not involved. This is clearly not a contract action. Although appellant, on occasion, has maintained that FDI breached an existing contract, we note that this is simply an antitrust action. In fact, in a state court action arising out of the same set of facts the Court of Appeals of Oregon has stated "there was no existing contract between plaintiff and Fiat but only the prospect of one." Ron Tonkin Gran Turismo, Inc. v. Wakehouse Motors, Inc., 46 Or. App. 199, 210, 611 P.2d 658, 664 (1980) (footnote omitted), petition for review denied, 289 Or. 373 (1980). The

court mentioned in a footnote that "Plaintiff claims there was an existing contract but the trial court ruled against plaintiff on this point and plaintiff does not appeal from this portion of the court's ruling." Id. 46 Or. App. at 210, n. 6, 611 P.2d at 664, n. 6. It is clear, therefore, that we are simply dealing with FDI's rejection of appellant's application to become an additional dealer in the Portland area.

ISSUES

A. Whether the grant of summary judgment with respect to the group boycott or refusal to deal claim was inappropriate because of the existence of a genuine issue of material fact.

B. Whether the grant of summary judgment with respect to the tying or exclusive dealing arrangement was inappropriate because of the existence of a genuine issue of material fact.

DISCUSSION

A. SUMMARY JUDGMENT

FRCivP 56(c) states, in relevant part, that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is settled law that

> "The burden is upon the party seeking the judgment to demonstrate the absence of any material fact and that the moving party is entitled to judgment as a matter of law. . . . In our examination of the record, we are required to draw all inferences in the light most favorable to the party opposing the motion . . . ." Blair Foods, Inc. v. Ranchers Cotton Oil, 610 F.2d 665, 668 (CA9 1980) (Citation Omitted).

This circuit has often noted that summary judgment is not particularly favored in antitrust litigation. E.g.,

id.[4] It is clear, however, that this general reluctance does not preclude the use of summary judgment in antitrust litigation. See Aladdin Oil Co. v. Texaco, Inc., 603 F.2d 1107, 1111 (CA5 1979). The mere existence of an anti-trust claim in a complaint does not render that complaint immune from Rule 56. In the absence of "any significant probative evidence tending to support the complaint",

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4. The Supreme Court has said that

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962). (Footnote omitted).

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20L.Ed.2d 569, rehearing denied, 393 U.S. 901, 89 S.Ct. 63, 21 L.Ed.2d 188 (1968), summary judgment is appropriate.

> "Indeed, the very nature of antitrust litigation would encourage summary disposition of such cases when permissible. Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also, ..., the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." Lupia v. Stella D'Oro Biscuit Co., Inc., 586 F.2d 1163, 1167 (CA7 1978), cert denied, 440 U.S. 982, [99 S.Ct. 1791, 60 L.Ed.2d 242] (1979). Cf. Thi-Hawaii, Inc. v. First Commerce Financial Corp., 627 F.2d 991 (CA(1980).

In order to withstand a motion for summary judgment it is simply not enough to refer to disputed factual issues. The factual issues must be material. "A material issue is one which may affect the outcome of the litigation." Mutual

Fund Investors, Inc. v. Putnam Management Company, Inc., 553 F.2d 620, 624 (CA9 1977). As this court has said "'The showing of a "genuine issue for trial" is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.'" Bushie v. Stenocord Corporation, 460 F.2d 116, 119 (CA9 1972).

B. GROUP BOYCOTT OR CONCERTED REFUSAL TO DEAL.

[1] Section 1 of the Sherman Act proscribed "Every contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1. In order for a restraint to run afoul of the antitrust laws, however, it must be "unreasonable." Certain conduct has been held to be un-

reasonable per se, i.e., once a court has identified such conduct it is foreclosed from undertaking an inquiry into its reasonableness. Per se treatment is warranted, in certain areas because "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). The Court has emphasized that any "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." Continental T. V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-9, 97 S.Ct. 2549, 2561-62,

53 L.Ed.2d 568 (1977).

One type of activity that is commonly cited as being per se illegal is the group boycott or concerted refusal to deal. Appellant relies on Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), and its progeny for the proposition that the instant case fits within the "group boycott" rationale. In Klor's, Broadway-Hale, a chain of department stores, operated one of its stores next door to Klor's retail store. The two stores competed in the sale of radios, televisions, refrigerators and other household appliances. Broadway-Hale, apparently disturbed by Klor's price-cutting tactics, approached ten national manufacturers and their distributors and prevailed upon them to either not sell to Klor's or sell to it only at disciminatory prices and on highly unfavorable terms. Klor's brought

an action claiming that this concerted refusal to deal constituted an illegal group boycott. The defendants moved for summary judgment, arguing that there was no public injury because there were hundreds of other appliance retailers, some within blocks of Klor's who sold competing brands of appliances, including those the defendants refused to sell to Klor's. The Supreme Court concluded that a group boycott of this nature would always be condemned, regardless of any adverse effect on competition.

> "Group Boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . Even when they operated to lower prices or temporarily to stimulate competition they were banned." Id. at 212, 79 S.Ct. at 709. (Footnote omitted).

The Court noted that it was not faced with "a case of a single trader refusing to deal with another, nor even of a manu-

facturer and a dealer agreeing to an exclusive distributorship. Alleged in [the Klor's] complaint is a wide combination consisting of manufacturers, distributors and a retailer." Id. at 212-3, 79 S.Ct. at 709-710. "(Footnote omitted, emphasis added).[5]

Klor's has often been criticized, not so much because of the result reached, but because the Court failed to articulate with any degree of precision a definition of "group boycott" or to offer

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5. United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966), relied upon by appellant, is like Klor's, in that it involved a wide ranging conspiracy and did not offer any precise definition of those group boycotts which warrant application of the per se rule. Also, General Motors is typically viewed as a largely horizontal conspiracy. See e.g., Sylvania, supra, at 58, n. 28, 97 S.Ct. at 2561, n. 28. We need not consider the continuing validity of General Motors. See generally Posner, The Rule of Reason and the Economic Approach; Reflections on the Sylvania Decision, 45 U.Chi.L.Rev. 1 (1977).

an explanation for why all concerted refusals to deal warranted per se treatment. See. e.g., Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination, 79 Colum.L.Rev. 685 (1979); Rahl, Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case, 45 Va.L. Rev. 1165 (1959). In fact, one commentator, after examining the Supreme Court's discussion in Klor's and considering the feasibility of articulating a workable definition of group boycotts, concluded that "It seems even more clear that any comprehensible per se rule for boycotts is . . . out of the question." Rahl, supra, at 173. "Indeed, there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." Sullivan, Handbook of the Law of Antitrust, §83 at 229-30 (1977).

The term "group boycott" can be applied to divergent types of concerted activity, not all of which necessarily have a pernicious effect on competition or lack any redeeming virtue. The simple use of labels cannot suffice, because this would create the possibility that reasonable concerted activity would be proscribed. See Worthen Bank & Trust Co. v. National Bankamericard Inc., 485 F.2d 119, 125 (CA8 1973), cert. denied, 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). The broad language of Klor's and General Motors is not helpful in resolving this case.

Two recent Second Circuit decisions are instructive. In Oreck Corporation v. Whirlpool Corporation, 579 F.2d 126 (CA2 1978)(en banc), cert. denied, 439 U.S. 946, 99 S.Ct. 340, 58 L.Ed.2d 338, rehearing denied, 439 U.S. 1104, 99 S.Ct. 883, 59 L.Ed.2d 65 (1979), Oreck charged

Whirlpool and Sears with engaging in a conspiracy in unreasonable restraint of trade to exclude Oreck from the vacuum cleaner market. Oreck had been the exclusive distributor of vacuum cleaners under the "Whirlpool" name. Whirlpool also had manufactured vacuum cleaners for resale by Sears under the "Kenmore" label. The conspiracy was based on Oreck's allegation that Whirlpool did not extend Oreck's exclusive distributorship at the behest and insistence of Sears, a much larger purchaser of Whirlpool products. Under the jury instruction given, "the jury could simply have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vacuum cleaners and, on that basis, have found them guilty (as it in fact did) of a per se violation of §1 of the Sherman Act." Id. at 129. The jury was not required to find the existence of an anti-

competitive purpose or effect.

The Second Circuit found that an instruction on a per se theory was inappropriate. The court stated

> "It is important to distinguish between 'horizontal' restraints, i.e., agreements between competitors at the same level of market structure, and 'vertical' restraints, i.e. combinations of persons at different levels of the market structure, such as manufacturers and distributors. . . . Horizontal restraints alone have been characterized as 'naked restraints of trade with no purpose except stifling competition,'. . . and, therefore, per se violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products . . . . They are, therefore, to be examined under the rule of reason standard." Id. at 131 (Citations omitted).[6]

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6. The rule of reason provides a more discriminating way of differentiating true exclusive dealerships from two-firm vertical combinations to exclude a distributor from supply . . . 'Per se rules of illegality are appropriate only when they relate to conduct

Because the restraint involved was characterized as vertical, the court expressed a reluctance to use the per se rule because to do so would interfere with the because to do so would interfere with the business decisions of a manufacturer without any assurance that the purposes of the Sherman Act would be served thereby.

> "It has always been the prerogative of a manufacturer to decide with whom it will deal. See United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465 [63 L.Ed. 992] (1919). Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire may

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Ftn. 6 (cont'd)

> that is manifestly anticompetitive.' Continental T. V., Inc. v. GTE Sylvania, Inc., supra [433 U.S.] at 49, 50, 97 S.Ct. 2549, 2558 [53 L.Ed.2d 568]; and where the conduct involved is an agreement between a single manufacturer and a single distributor which results in a sole distributorship for the manufacturer's products, a careful inquiry into the business justifications for the agreement is required." Oreck, supra, at 131-2, n. 6.

> have amounted to tortious interference; but, without some further showing that from this course of conduct there was an anticompetitive effect in the vacuum cleaner industry as a whole, it is inconsistent with the sanctity of contractual arrangements to allow the antitrust laws to inject a provision into the agreement which would require Whirlpool to renew Oreck's distributorship for as long as it is able to compete successfully with Sears. In this case, therefore, something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown. The agreement becomes violative of §1 of the Sherman Act only if it is anticompetitive in purpose or effect--in sum, it must be tested by the rule of reason. Without any consideration of the anticompetitive purpose or effect, arbitrarily seeking to protect Oreck simply because Whirlpool refused to renew a contract with Oreck which had terminated by its own terms, even though this refusal was in whole or in part, due to persuasion by Sears, disregards the well established rule that 'the antitrust laws . . . were enacted for "the protection of competition, not competitors . . ."' Id. at 133-4.

In Borger v. Yamaha International Corporation, 625 F.2d 390 (CA2 1980), a case with facts much like those in the instant case, the Second Circuit again

refused to apply the per se rule to activity which could conceivably be labeled as a "concerted refusal to deal." Yamaha, a United States importer of various consumer products, including high fidelity audio equipment, distributes its audio products through franchised dealers in a limited distribution system. After some preliminary negotiations, it appeared that Borger would become a franchised dealer in Manhattan. Prior to consummation of the franchise agreement, Yamaha contacted two existing Yamaha dealers in Manhattan and discussed Borger's appointment as a dealer. The two dealers expressed a negative reaction to the appointment and Yamaha subsequently decided not to grant Borger the dealership.

Borger brought an action against Yamaha and its dealers alleging two violations of Section 1 of the Sherman Act, a group boycott and a conspiracy to

fix prices. Borger also alleged breach of contract and promissory estoppel, but the district judge refused to submit these counts to the jury. The jury returned a verdict in favor of Borger. The Second Circuit reversed and remanded because of errors in the instructions similar to those which existed in Oreck.

The district court judge had instructed the jury that because "there was no evidence to support a finding of horizontal combination or contract, the question for the jury was whether Yamaha had entered into a vertical combination with one or both of the dealers with whom it consulted prior to rejecting Borger's application." Id. at 394 (emphasis added). The jury was instructed on a rule of reason theory. The instructions, however, stated that a finding of illegality would be justified if Yamaha had the sole purpose of protecting

either or both of the existing dealers from competition. The Second Circuit, relying on Oreck, stated "In the instant case, the jury was instructed to find Yamaha liable solely on the basis of a purpose to restrict intrabrand competition, without any finding of either a purpose or effect related to interbrand competition. This was reversible error." Id. at 397. We find that the logic used by the Second Circuit is sound.

In both Oreck and Borger the vertical-horizontal distinction was crucial to the determination of whether to apply a per se or a rule of reason analysis. The importance of this distinction has been recognized in this circuit as well. We said, in Gough v. Rossmoor Corporation, 585 F.2d 381 (CA 9 1978), cert denied, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979), that

> "In all cases so far holding such restraints to be per se unreasonable, there has been some horizontal concert of action taken against the victims of the restraint. In Mutual Fund Investors v. Putnam Management Co., supra, this court rejected the contention that the refusal to deal there under fire constituted a per se illegal group boycott, stating 'At issue is an alleged conspiracy among vertically integrated organizations, and agreements among them are not per se illegal.' 553 F.2d at 626." Id. at 387. (Footnote omitted).

The vertical-horizontal distinction is not always dispositive. In Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (CA3 1979), the court was faced with the termination, by a manufacturer of kitchen cabinets, of one of its customers, a discount house, at the behest of another customer, a retailer, allegedly because of price considerations. On appeal from a grant of summary judgment for the defendants, the court considered whether a per se rule could have been applied to the challenged conduct.[7]

The court asserted that Sylvania did not necessarily mean that any restraint which could be characterized as vertical could not be analyzed under a per se approach.

> "When a manufacturer acts on its own, in pursuing its own market strategy, it is seeking to compete with other manufacturers by impos ing what may be defended as reasonable vertical restraints. This would appear to be the rationale of the GTE Sylvania decision. However, if the action of the manufacturer or other supplier is taken at the direction of its customer, the restraint becomes primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier. Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level." Id. at 168.

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7. The court mentioned that a 'rule of reason' analysis would not be available to the plaintiff because the necessary anticompetitive effects as to a particular product in a relevant market could not be proven. Cernuto, supra, at 165 and n. 1.

The court emphasized that the motivating factor in the alleged conspiracy was price, i.e., the conspiracy sought to protect the existing retailer from the price competition of a discounter. Oreck was distinguished because, in addition to a lack of proof that price control was the likely purpose of the Whirlpool-Sears agreement, Whirlpool had done no more than refuse to renew a contract while the manufacturer in this case had breached a two year agreement after only three months. In Cernuto, therefore, there was clearly less of a likelihood that the manufacturer's decision could be considered an element of its own marketing strategy. In conclusion, the court stated that

> "If Cernuto can prove at trial that United, Lappin and Famous conspired to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a price related end,

> then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving kitchen cabinet sales in Western Pennsylvania." Id. at 170.

While allowing the possibility that plaintiff's theory could be disproved, the court, because of the procedural posture (appeal from a grant of a motion for summary judgment), assumed the facts were as plaintiff had stated.

[2] It seems, therefore, that a characterization of a restraint as vertical or horizontal is not necessarily determinative of the analysis--either per se or rule of reason--to be applied. In fact, it has been noted by one commentator that

> "A number of decisions involving concerted refusals to deal have turned upon the relationship between the boycotting parties; that is, whether the agreement could be characterized as at least partially horizontal or as solely vertical. This distinction has only limited utility. When considered apart from the purpose and the effect of

> the agreement, it can lead to undesirable results." Bauer, supra, at 712.

We have recognized, in Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (CA 9 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L. Ed.2d 755, rehearing denied, 397 U.S. 1003, 90 S.Ct. 1113, 25 L.Ed.2d 415 (1970), that the presence of a horizontal element does not require the use of a per se rule. Hawaiian Oke indicates that an inquiry must be made to determine whether there exists an anticompetitive purpose or effect.[8] And it must be emphasized

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8. In deciding whether to apply a per se rule the courts examine the nature, history, purpose and probable effect of the restraint. This rather extensive inquiry is appropriate, although at least one commentator concluded that the benefits of such a per se rule are illusory.

> "A boycott rule which is not geared to a cogent test of effect on competition is thus completely unmanageable. Even with such a test, it

Ftn. 8, cont.

> seems very doubtful that efforts to call it per se would serve any useful purpose. A boycott is a general method of doing business and lacks the specificy of price-fixing or territorial division which are practices that lend themselves more immediately to per se treatment. Price-fixing lays its hand obviously and directly upon the primary mechanism of competition. Division of territory is an out and out agreement not to compete. But a boycott must be connected up with competition before it can be condemned with assurance. The connecting up process, of course, is the very exercise of 'reason' which a per se rule seeks to obviate. . . . Surely . . . the boycott rule can[not] be said to contribute very much to certainty at this point. Nor . . . [is it] likely to save much time and effort in administration and trial . . . . [I]t would seem that nearly as much time will be consumed in ascertaining whether the transaction fits the category as would be consumed without any rule, and substantially the same economic ground will have been covered." Rahl, supra, at 1172-73.

We believe that despite the apparent lack of ease in application there is some benefit to the use of a per se rule in the concerted refusal to deal context. Professor Bauer has advocated a modified per se rule.

trust laws. Sylvania, supra, at 52, n. 19, 97 S.Ct. at 2558 n. 19.

[3] Although FDI contends that its actions were solely unilateral, we assume, because on review of a grant of a motion for summary judgment we draw all

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Ftn. 8, cont.

> "Courts should apply a per se rule to group boycotts only when two conditions are met: first, the conduct must be intended to coerce or exclude other entrepreneurs; second, the conduct must be likely to have anticompetitive effects. A third factor--the defendant's market power--may bear on the purpose of a concerted refusal to deal and its likely effect; courts should be less disposed to apply the per se rule where the defendant's share of the market is small. Unless both of these conditions are met, the court should apply the rule of reason." Bauer, supra, at 705.

It seems apparent that an inquiry of this nature is somewhat less elaborate than that required under the rule of reason and that it properly focuses attention on the relevant inquiry, i.e., the probable effect on competition.

reasonable inferences in favor of the non-moving party, that FDI and Wakehouse acted jointly.[9]. This concert of action

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9. There is no allegation that there exists another conspirator at the distributor level. There is no assertion that FDI has sought to preclude alternative sources of supply. Appellant maintains, seemingly as an afterthought, that, in addition to the vertical component, there exists a wide ranging horizontal conspiracy including all the Fiat dealers in the Northwest. The only evidence which allegedly supports the existence of this conspiracy is the May 21, 1975 mailgram. The magistrate, in his discussion of the group refusal to deal claim, did not even mention the possibility that the decision not to grant appellant a Fiat dealership went beyond the one-to-one arrangement between FDI and Wakehouse We agree with the magistrate's implicit conclusion that there does not exist "significant probative evidence" to support the existence of a wide ranging conspiracy. We note that there is no indication that the other Fiat dealers played any role in the decision to return appellant's check or to grant Wakehouse the two probationary periods in which to increase sales. The mailgram was sent after these events occurred. There is no indication that the other dealers had any effect on the decision not to appoint appellant. There is also no

indication that there was any horizontal market division or dealer cartelization. Professor Posner noted, in suggesting an approach to restricted distribution cases which attempts to isolate and condemn only restrictions imposed nominally by the manufacturer but which are in fact desired for monopolistic purposes by dealers using the manufacturer as their enforcement agent, that

> "Under this test, many cases would be dismissed simply on a showing that the dealers' share of the relevant market was too small to give them the power to collude effectively. If American Motors has two percent of the U.S. automobile market and its dealers sell only American Motors cars, it is inconceivable that the purpose of giving American Motors dealers exclusive territories is to cartelize the distribution of automobiles. While it is true that, in principle, some (very few) consumers may so prefer American Motors to competing brands of automobiles that the dealers in those cars face as a group a down-ward-sloping demand curve, the slope is too close to being horizontal for courts to worry about dealer collusion." Posner, supra, at 17 (Footnote omitted).

does not, however, mean that appellant's version of the facts justify the application of a per se rule. The use of a per se rule could only be justified if, drawing all reasonable inferences in favor of appellant, the challenged conduct clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue. We cannot say that this is the case and, consequently, find that the rule of per se illegality has no role in our disposition of the case.

[4] Appellant seems to argue that the per se rule should be applied because the challenged conduct was undertaken with the purpose of allowing Wakehouse to continue to extract monopoly profits. This theory is based on appellant's view that Fiat cars constitute the relevant product market. The magistrate concluded that the relevant product market was cars in general. The lower court concluded

that appellant "should not be allowed to go to trial on its unsupported allegation that, for 'a sizeable number of customers . . .[o]nly a Fiat . . . ., will do.'" We agree with this assessment. Appellant has not presented significant probative evidence which contradicts the assertion that the product market involved is characterized by vigorous inter-brand competition.[10] There has been no suggestion that the failure to increase intrabrand competition for a product with a very small share of the market had any effect whatsoever on interbrand competition.

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10. On the facts of this case we agree with the magistrate's determination not to treat the subsidiary markets--parts, service and warranty--as separate from the market for cars. We note that the dispute is over the rejection of the application for a Fiat dealership, which includes, in addition to the retail sale of cars, the parts and service work. There is no indication that these were treated separately in the application process and we refuse to do so for purposes of our analysis.

[5] Fiat's insignificant market power in a market characterized by vigorous interbrand competition is important to our analysis. We note, at the outset, that the antitrust laws are primarily concerned with interbrand competition. This is true because the existence of interbrand competition "provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Sylvania, supra, 433 U.S. at 52, n. 19, 97 S.Ct. at 2558 n. 19. The market conditions make it evident that appellant's contention that the challenged conduct was undertaken solely to allow Wakehouse to continue to reap monopoly profits is simply unfounded. There is no significant probative evidence which supports that proposition. In fact, appellant seems to recognize that an im-

portant factor in FDI's decision to postpone its decision to appoint an additional dealer was its desire to stimulate Wakehouse's sales, i.e., its desire to promote interbrand competition. The desired increase in Wakehouse's sales convinced FDI that it was not in its economic interests to appoint appellant as an additional dealer. It is clear, therefore, that the failure to increase intrabrand competition was not necessarily pernicious. The courts have recognized the benefit to encouraging the promotion of interbrand competition which occurs by allowing a business to distribute its products in a particular fashion. Sylvania, supra, 433 U.S. at 54, 97 S.Ct. at 2559.

[6] Businessmen may, within certain limits, decide to deal with whom they wish. Our conclusion, or a plaintiff's, that a defendant exercised poor business

judgment, that a defendant treated someone unfairly, or that a potential competitor has been injured does not mean that the antitrust laws have been violated. The cases discussed above indicate that the courts are reluctant to interfere with a company's business decision to distribute its products in a particular fashion. We do not expect businesses to be run in an altruistic fashion, but, particularly when there is vigorous interbrand competition, "the interests of the manufacturer and the consumer with regard to product distribution coincide." 92 Harv.L.Rev.1160, 1164 (1979). It is in the interests of FDI to see to it that its product is distributed in an efficient fashion. The economic interests of FDI dictate that it seek to improve sales. It is clear that the desire to stimulate sales was a factor in FDI's decision not to appoint an

additional dealer.[11] Appellant seems to recognize this, but it continues to attach talismanic significance to the existence of an additional competitor. The antitrust laws are concerned with competition and we must recognize that FDI's decision not to appoint an additional dealer in an effort to expand its small share of the market had the potential to benefit competition.[12] Accordingly, we cannot say that the use of a per se rule would be justified. There is assuredly no "significant probative evidence" which would indicate that the challenged conduct had, or was likely

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11. This militates against the position that FDI succumbed to the economic pressure of a small dealer in order to allow that dealer to restrict sales in its effort to extract monopoly profits.

12. It is not sufficient for appellant to assert that a viable legal theory is stated because of an abstract lessening of intrabrand competition.

to have, a pernicious effect on competition or lacked any redeeming virtue. Therefore, the rule of reason is the appropriate analysis. This analytical framework provides a more discriminating tool by which to evaluate the competitive significance of the challenged conduct.

Ftn. 12, cont. See Aladdin Oil, supra, at 1116. This is not sufficient to make out a per se violation of the Sherman Act. This is not a case involving the termination of an existing dealer as discipline for price-cutting tactics. See Cernuto, supra, at 170; Bauer, supra, at 715. This case, as appellant conceded, does not involve what may very well be considered to be a naked restraint on competition. FDI simply decided to increase its small percentage of the Portland market through its existing distributional scheme. Appellant admits that FDI was attempting to increase its sales through Wakehouse, but alleges that the failure to increase intrabrand competition precludes our recognition of the increase in interbrand competition as a "redeeming virtue". As our discussion makes plain, we simply disagree with this reading of the relevant case law.

[7] There is a greater reluctance to uphold a grant of summary judgment when the rule of reason is the appropriate standard. Harold Friedman, Inc. v. Thorofare Markets, Inc., 587 F.2d 127, 141, n. 51 (CA3 1978); 92 Harv. L.Rev. 1160, 1167-9 (1979). This court once commented, however, that because there was no tenable per se boycott theory "appellants must evince a substantially adverse effect on competition in the relevant market to support a viable legal theory. Appellants point to the alleged injury to their businesses, but fail to provide any evidence that the 'effect upon competition in the market-place is substantially adverse.'" Mutual Fund, supra, at 627. Appellant's case suffers from the same deficiencies noted in Mutual Fund.

[8] We hold that the grant of the motion for summary judgment was proper.

Primarily because of the market structure and Fiat's small percentage of that market, the decision not to appoint an additional dealer cannot be said to be so plainly anticompetitive as to justify resort to a per se rule. The rule of reason is, therefore, the appropriate standard. And even under that standard appellant cannot withstand a motion for summary judgment. Appellant has simply failed to evince "significant probative evidence" of a substantially adverse effect on competition.

C. TYING OR EXCLUSIVE DEALING ARRANGEMENT

[9] The magistrate rejected appellant's tying arrangement claim, noting that "Plaintiff simply fails to show the existence of two separate products." We agree. Appellant had simply misconstrued the case law concerning tying arrangements. The challenged conduct

bears absolutely no relation to a tying arrangement.

A charitable reading of appellant's allegations indicate that what is being objected to is an offer to enter into an exclusive dealing arrangement. There was no executed transaction.[13] Although there are numerous reasons[14] which

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13. In fact, appellant's objection is not so much to the alleged exclusive dealing arrangement as it is to FDI's refusal to enter into the arrangement. Thus, it is clear that it is the decision not to appoint an additional dealer which is the basis of appellant's claim. The "sacrifices" allegedly made by appellant during the application process would be more relevant to proving the existence of a dealership agreement on a promissory estoppel theory. As we have noted, the contract issues already resolved against appellant in the state court are not before us.

14. For example, there is no indication that an exclusive dealing arrangement such as that described by appellant would have any, much less a substantial, effect on competition. See Brattleboro Auto Sales, Inc. v. Subaru of New England, Inc., 633 F.2d 649 (CA2 1980).

support the propriety of the grant of summary judgment on the issue, it suffices to say that Section 3 of the Clayton Act has no application in the absence of an executed agreement. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (CA4 1959); Leo J. Meyberg Co. v. Eureka Williams Corp., 215 F.2d 100 (CA9 1954), cert. denied, 348 U.S. 875, 75 S.Ct. 113, 99 L.Ed. 689; Nelson Radio & Supply Co. v. Motorola, 200 F.2d 911 (CA5 1952), cert. denied, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953).

CONCLUSION

The decision of the district court to grant summary judgment in favor of appellees was appropriate and, therefore, we affirm.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT.

FOR THE DISTRICT OF OREGON

RON TONKIN GRAN TURISMO, INC., Plaintiff,	)	Civil No 75-1102
v.	)	ORDER
FIAT DISTRIBUTORS, INC., and WAKEHOUSE MOTORS, INC., Defendants.	)	

Plaintiff has filed objections to the findings and recommendation of the Magistrate. I have made a de novo review of those portions of the findings and recommendation to which objection has been made and affirm the Magistrate's findings and recommendation.

This action will be dismissed.

Dated: December 4, 1978.

/s/ ROBERT C. BELLONI
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

RON TONKIN GRAN TURISMO, INC.,	)	
	)	
Plaintiff,	)	Civil
	)	75-1102
v.	)	
	)	
FIAT DISTRIBUTORS, INC., and WAKEHOUSE MOTORS, INC.,	)	
	)	
	)	
Defendants.	)	

FINDINGS AND RECOMMENDATION

Plaintiff Tonkin, a Portland dealer in foreign cars alleges various anti-trust violations by defendant Fiat, the United States auto distributorship, wholly owned by its international parent, and defendant Wakehouse, another Portland car dealer. Tonkin's complaint, liberally construed, includes the following Sherman and Clayton Act claims: (1) monopoly; (2) attempt to monopolize; (3) conspiracy to monopolize; (4) tying arrangement; (5) group refusal to deal; and (6)

price fixing.[1] Both defendants have moved for summary judgment on all issues. While it is true that, on motion for summary judgment, all factual inferences should be drawn in favor of the party moved against, plaintiff in this case must make some showing of "significant probative evidence" tending to support his claim in order to avoid summary judgment. First National Bank v. Cities Service, 391 U.S. 253, 290, reh. denied 393 U.S. 901 (1968). Even in antitrust, where complex factual issues concerning intent and economic effects often arise, one opposing summary judgment must point to material issues of fact which could prevent the moving party from prevailing

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1 Plaintiff's half-hearted claim that Fiat's international parent may have conspired with certain Arab concerns to destroy Tonkin's business because Tonkin is Jewish is not supported by any factual allegations.

at trial. Tonkin raises many factual issues in its brief; none of them is material.[2]

(1) Monopoly. Tonkin charges that both Fiat and Wakehouse have monopolized trade in violation of section 2 of the Sherman Act. There is no dispute that Wakehouse sells the only Fiats in the City of Portland nor that Fiat is the only distributor of Fiats for the Portland market. It is also admitted by all parties that Portland constitutes the relevant geographic market for these purposes. Tonkin's problem is with the relevant product market. He contends that Fiat cars are a product market in themselves, and that defendants there-

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2. The "issues of fact" surrounding the existence or not of a contract between Fiat and Tonkin, the intent of Wakehouse and Fiat, and the potential quality of Tonkin as a Fiat dealer are simply not material.

fore control 100% of the relevant market, thus have monopolized that market.

The relevant-product market is not Fiats; it is cars in general. The automobile market has always shown high cross-elasticity of demand. There is nothing so special about a Fiat that a prospective purchaser will refuse to buy a Datsun or Chevette, no matter what the price of a Fiat. Other courts have considered and rejected allegations similar to Tonkin's with respect to Cadillac, Mogul v. General Motors Corp., 391 F. Supp. 1305 (E.D. Pa. 1975), Aff'd 527 F.2d 645 (3d Cir. 1976), and Dodge, Mt Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453, 461 (W.D. Pa. 1968), aff'd 417 F.2d 622 (3d Cir. 1969). Plaintiff should not be allowed to go to trial on its unsupported allegation that, for "a sizeable number of customers . . . [o]nly a Fiat, or a Lancia,

will do." Plaintiff's Response to Defendants' Motions for Summary Judgment at 93.

Defendants' share of the relevant product market thus falls far short of that necessary to establish monopoly. Plaintiff nowhere maintains that defendants' share of the automobile market approaches the 60% threshold stated in United States v. Aluminum Co of America, 148 F.2d 416 (2d Cir. 1945). Both defendants are therefore entitled to summary judgment on the issue of monopolization.[3]

(2) Attempt to Monopolize. Plaintiff argues that Fiat and Wakehouse have

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3. Plaintiff's claim that Wakehouse and Fiat have monopolized Fiat parts cannot be sustained without extending the Sherman Act's prohibitions to every exclusive or sole parts dealership. To choose to buy a car is to choose to buy parts for that car wherever they may be found.

attempted to monopolize trade, in violation of section 2 of the Sherman Act. Plaintiff's memorandum does not make clear what facts are relied upon in support of this claim, but it is more than fair to plaintiff to assume that defendants are charged with attempting to monopolize either the trade in Fiats or that in cars in general. In either case, defendants must prevail.

Plaintiff points out the Ninth Circuit holding in Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.) cert. den'd, 377 U.S. 993 (1964), to the effect that an antitrust plaintiff need establish only the specific intent of a defendant to monopolize trade; the relevant market need not be described. Since specific intent is an issue of fact in this case, plaintiff thus hopes to evade summary judgment. This hope is ill-grounded for three reasons.

First, the Supreme Court held in 1965 that some appraisal of the relevant market is necessary to a claim of attempted monopoly. Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177 (1965).

Second, the Ninth Circuit has, since Lessig almost uniformly insisted on proof of something beyond specific intent to show attempted monopolization. This added element has been characterized as proof of market power in the defendant or predatory practices by the defendant. Moore v. Matthews, 550 F.2d 1207, 1219 (9th Cir. 1977); Pacific Coast Agricultural Export Ass'n v. Sunkist Growers, Inc., 526 F.2d 1196, 1205 (9th Cir. 1976); Knutson v. Daily Review, Inc., 548 F.2d 795, 814 (9th Cir. 1976) (citing cases). As above, plaintiff cannot show sufficient market power in the relevant market. There is no

allegation or factual support of any charge of predatory practices.

Lastly, and most important, the reason for the rule in Lessig simply does not apply here. The holding in Lessig that nothing more than specific intent need be demonstrated rested on a close reading of Swift & Co. v. United States, 196 U.S. 375, 396 (1905) which led the Lessig court to conclude that the dangerous probability of actual monopolization to which proof of market power is relevant may be inferred from the specific intent to monopolize alone. Lessig, supra, at 474 n. 46. The problem this poses for plaintiff is that, no matter what it can show in the way of specific intent to monopolize, there can be no danger of actual illegal monopolization. Wakehouse and Fiat already have 100% of the Portland Fiat market which, as above, is not a monopoly such as

violates the Sherman Act. Plaintiff does not allege that either defendant seeks to capture further shares of markets in other makes of automobiles. Plaintiff alleges only that Wakehouse and Fiat have sought to maintain their control of the Portland Fiat market. In short, since the object of defendants' attempts is not actionable, neither is the attempt. This reasoning applies equally to plaintiff's identical claims regarding Lancia.

Both defendants should therefore be granted summary judgment on the issue of attempted monopolization.

(3) Conspiracy to Monopolize. The rationales set out immediately above indicate the same result on plaintiff's conspiracy allegations. While conspiracy includes the doing of lawful acts by unlawful means, plaintiff claims only that defendants conspired to reach unlawful results; namely, monopoly, not that their

means were unlawful. Summary judgment should therefore be granted to defendants on the claim of conspiracy to monopolize.

(4) Tying Arrangement. Tonkin maintains that Fiat told him it would grant him a Fiat dealership only if he ended his dealings with Saab and Honda, whose cars he had been selling. This, says Tonkin, violates section 3 of the Clayton Act, 15 U.S.C. § 14, and section 1 of the Sherman Act, because it ties the Fiat distributorship to the termination of the Saab and Honda distributorship.

This is an exclusive franchise, not a tying arrangement. An illegal tying arrangement violates the antitrust laws by requiring that a product buyer purchase from a seller not only the product he wants (the tying product), but also another product (the tied product). The seller's market power in the tying product allows him to foist upon the

buyer the unwanted tied product. It is thus essential that there be two separate products, one tying, one tied. Moore v. Matthews, 550 F.2d 1207, 1215 (9th Cir. 1977); Siegel v. Chicken Delight, 448 F.2d 43, 47 (9th Cir. 1971), cert. den'd, 405 U.S. 955 (1972).

The issue here is not whether negative tying arrangements violate the law. Clearly, they do. Plaintiff simply fails to show the existence of two separate products. Fiat's requirement was that Tonkin not buy cars from Saab or Honda if it was to buy cars from Fiat. There is no tied product.

Further, to prevail on a tying claim, plaintiff must show that defendant had market power in the tying product sufficient to exert abusive pressure in the market for the tied product. Moore v. Matthews, supra at 1215. As already discussed, defendants have no appreciable

power in the relevant market.

Finally, even assuming Saab and Honda (or their absence) can somehow be construed as a tied product, neither of the defendants has any economic interest whatever in either of them. Thus, plaintiff lacks another element needed to build a claim against per se illegal tying arrangements. Moore v. Matthews, supra at 1216, citing Venzie Corp. v. United States Mineral Products Co., Inc., 521 F.2d 1309, 1317 (3rd Cir. 1975).

Fiat and Wakehouse are therefore entitled to summary judgment on plaintiff's tying claim.

(5) Group Refusal to Deal. Fiat and Wakehouse have an understanding (given all inferences favorable to plaintiff) that Wakehouse shall be the sole Portland distributor of Fiats and Lancias.

Wakehouse is an exclusive outlet. Plaintiff alleges that the refusal of Fiat to sell cars to Tonkin because of Fiat's understanding with Wakehouse constitutes a group refusal to deal per se illegal under section 1 of the Sherman Act as an agreement in restraint of trade.

Such a one-to-one relationship is neither per se illegal nor unreasonable under a rule of reason analysis. A national distributor may assign its retail outlets exclusive areas of operation without running afoul of the antitrust statutes where other brands are available in the market. United States v. Arnold Schwinn & Co., 388 U.S. 365, 376 (1967). The exclusive Wakehouse dealership excludes other Portland dealers, including plaintiff, only from the Fiat market, not from the automobile market. They may freely deal in the many brands which compete with Fiat and are substantially

equivalent. Plaintiff's case citations concern only situations in which large numbers of dealers and distributors agreed to exclude selected dealers or in which a plaintiff was entirely excluded from a relevant market, e.g., Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975) (plaintiff completely shut out of Northwest flour milling).

The arrangement between Fiat and Wakehouse is a proper exclusive dealership under the antitrust laws. Wakehouse has no power over Fiat's licensing of other distributors other than ordinary business leverage. Fiat will change to another dealer or dealers when its economic interests, as it perceives them, so require.

Summary judgment should therefore be granted on the issue of refusal to deal.

(6) Price fixing. Plaintiff alleges

price fixing in its complaint but neither further addresses the issue in its memorandum nor offers any factual allegations to support such a charge.

Summary judgment is therefore appropriate on the issue of price fixing.

Dated this 25 day of January, 1978.

/s/ GEORGE E. JUBA
United States Magistrate